1989

State of Utah v. Roy W. Hall : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Respondent, v. ROY W. HALL, Defendant/Appellant.	Case No. 89-0262-CA

REPLY BRIEF OF APPELLANT

Appeal from a judgment and conviction for rape, a first degree felony, in violation of Utah Code Ann. section 76-5-402, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, Judge, presiding.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....ii

INTRODUCTION.....1

ARGUMENT

I. THE COURT COMMITTED REVERSIBLE ERROR IN LIMITING THE VOIR DIRE OF APPELLANT'S JURORS. 1

A. REFUSAL TO ASK REQUESTED VOIR DIRE QUESTIONS.....1

B. STIFLING MOTIF IN CONDUCTING VOIR DIRE.....3

II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING THE HEARSAY STATEMENTS OF JESSICA HADFIELD. 5

III. THE COURT'S PERFORMANCE DURING THE SENTENCING PHASE OF APPELLANT'S TRIAL WAS ARBITRARY AND CAPRICIOUS, AND DENIED APPELLANT DUE PROCESS. 7

CONCLUSION.....11

TABLE OF AUTHORITIES

Page

Cases Cited

California v. Green, 399 U.S. 149 (1970).....6

Peters v. Kiff, 407 U.S. 493 (1972).....5

State v. Ball, 685 P.2d 1055 (Utah 1984).....3, 4

State v. Bishop, 753 P.2d 448 (Utah 1988).....3

State v. Carson, 597 P.2d 862 (Utah 1979).....10

State v. Guinn, 752 P.2d 632 (Idaho App. 1988).....6

State v. Harvey, 491 P.2d 660 (Wash.App. 1971).....9, 10

State v. Worthen, 765 P.2d 839 (1988).....2, 4, 5

Statutes and Constitutional Provisions

Utah Constitution Article 1 section 7.....3

Utah Constitution Article 1 section 10.....3

Utah Constitution Article 1 section 12.....3

United States Constitution Amendment V.....3

United States Constitution Amendment VI.....3

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Respondent, v. ROY W. HALL, Defendant/Appellant.	Case No. 89-Ø262-CA

INTRODUCTION

Appellant relies on his opening brief, and refers this Court to that brief for the statements of jurisdiction, issues, the case, the facts, and summary of the argument. Appellant responds to the State's answer to the opening brief as follows:

I.
THE COURT COMMITTED REVERSIBLE ERROR IN LIMITING THE VOIR DIRE OF APPELLANT'S JURORS.

A. REFUSAL TO ASK REQUESTED VOIR DIRE QUESTIONS

Respondent initially claims that the record in insufficient to support Appellant's claim that the trial court failed to ask requested voir dire questions.[1] As reflected in pages 68 through 71 of the transcript, the trial court gave Appellant the opportunity to make a record of the bench conference during which the additional voir dire questions were requested. Appellant recognizes that the trial court did not think that Appellant had requested that the jurors be questioned regarding their acquaintances in the county attorney's office (T.

1 Respondent's brief at 6.

69), but notes that defense counsel indicated that she did ask the court to inquire into that topic (T. 69). The trial court specifically recognized that defense counsel's objections to the court's failure to ask the requested questions were timely, stating, "[Y]ou have your record." (T. 71).

Appellant counters the State's assertion that Appellant has failed to demonstrate the relevance of the requested voir dire questions[2] by reference to the standard of propriety of voir dire questions set forth by the Utah Supreme Court:

> All that is necessary for a voir dire question to be appropriate is that it allow "defense counsel to exercise his peremptory challenges more intelligently."

State v. Worthen, 765 P.2d 839, 845 (1988). The questions requested by Appellant and refused by the trial court (questions concerning juror leadership roles, experience as jury forepersons, study of law, experience in the military, relationship with members of the county attorney's office, membership in the LDS church, views on the crime of rape, and views on the punishment in this case) would have given defense counsel insight into the perspectives of the prospective jurors and allowed her to exercise peremptory challenges more intelligently, and were thus "relevant" voir dire questions under Utah law.

Finally, Appellant has shown prejudice resulting from the trial court's failure to ask the requested voir dire

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2 Respondent's brief at 6, 7.

questions;[3] as a result of the trial court's failure to ask the voir dire questions, Appellant was tried by a jury led by a foreperson related to the deputy county attorney (T. 353-405). Compare State v. Ball, 685 P.2d 1055, 1056-1060 (Utah 1984)(reversible error committed in trial for driving under the influence of alcohol when trial court refused to ask voir dire question relating to the religious basis for juror abstention from drinking, when abstinent juror sat on jury).

B. STIFLING MOTIF IN CONDUCTING VOIR DIRE

The state indirectly defends the trial court's dictating answers to voir dire questions, by claiming that Appellant failed to provide legal analysis or authority in raising the issue, and failed to show prejudice resulting from the court's dictating the answers to the voir dire questions.

The legal authority and analysis that supports Appellant's objections and concerns about the trial court's dictating answers to voir dire questions is found at pages 6-12 of Appellant's opening brief. In summary, the Utah Constitution Article 1 sections 7, 10, and 12, and the fifth and sixth amendments to the United States Constitution guarantee Appellant a fair trial.[4] Inadequate voir dire violates a defendant's right to a fair trial.[5] To be adequate, voir dire should be conducted

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3 Respondent claims otherwise. Respondent's brief page 7.

4 Appellant's opening brief at 9.

5 Appellant's opening brief at 8, 9, citing State v. Bishop, 753 P.2d 448, 448 (Utah 1988).

in a manner which reveals latent biases of jurors.[6] In dictating the answers to the questions, and in refusing to entertain questions from the jurors,[7] the court effectively told the jurors not to reveal their known biases, and squelched any possibility of evoking responses indicative of latent biases.[8] In conducting the voir dire in this purpose-defeating manner, the court violated appellant's right to a fair trial.[9]

As Appellant noted in the opening brief, the court's manner of conducting the voir dire resulted in a dearth of information about the jury panel. This lack of information not only hindered Appellant's ability to exercise his peremptory

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6 Appellant's opening brief at 8, 11-12, citing State v. Ball, 685 P.2d 1055, 1058 (Utah 1984); State v. Worthen, 765 P.2d 839, 844-845 (Utah 1988).

7 The State apparently interpreted the court as willing to entertain questions from jurors on an individual basis. Respondent's brief at 8.

When Juror 1 asked permission to ask the court a question, the court responded, "Now, ma'am, when you say ask a question, let me continue. I don't want to start opening it up for questions because it's just not wise. If I need to, I'll take you separatly [sic] and see what your question is." (T. 37).

Appellant asserts that when the court told the jurors that he would entertain questions from them on an individual basis if the court saw fit, and then failed to take the question from the Juror 1 on an individual basis, the court in essence told the jurors that their questions were not welcomed unless requested by the court. In refusing to allow the jurors to ask questions during the voir dire, the court may have missed the opportunity to clarify voir dire questions for the jurors, and discouraged the jurors from participating in the voir dire in an open and meaningful fashion.

8 Appellant's opening brief at 9-11, citing transcript pages 35-55).

9 Appellant's opening brief at 6, 7.

challenges effectively, but also hinders his ability to point specifically to evidence of prejudice resulting from the court's manner of conducting voir dire.[10] Appellant again refers this Court to State v. Worthen, 765 P.2d 839 (Utah 1988), where the court explained that cases involving particularly abhorrent publicized facts, and involving weak evidence of guilt, effective voir dire is crucial. Id. at 845. Because this case involved abhorrent and publicized facts, and because this case had weak evidence of Appellant's intent, a thorough voir dire was essential, and the trial court's failure to conduct the voir dire properly created a great risk of harm to Appellant. In these circumstances, where the threat of prejudice is great, but specific proof of prejudice cannot be shown, it should be presumed. Cf. Peters v. Kiff, 407 U.S. 493, 504 (1972)(plurality opinion)(recognizing that because prejudice in racist jury selection is so pervasive and harmful, and yet so difficult to prove, it should be presumed).

II.
THE TRIAL COURT COMMITTED
REVERSIBLE ERROR IN ADMITTING
THE HEARSAY STATEMENTS OF JESSICA HADFIELD.

In response to Appellant's observation that the trial court violated the hearsay rule in admitting the seven speech board messages into evidence, the State first argues that the admission of the statements did not violate Appellant's right to confrontation. The State's confrontation clause analysis,

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10 Appellant's brief at 14.

however, is inapplicable to Appellant's hearsay objection. The hearsay rule and the confrontation clause are separate and different, California v. Green, 399 U.S. 149, 155-156 (1970), and Appellant is not claiming that the admission of the speech board messages violated his right to confrontation.

The argument provided by the State that applies to Appellant's argument concerning the hearsay rule is that any error committed in the admission of the speech board messages was either waived or rendered harmless by defense counsel's discussion of the messages during cross-examination. Respondent's brief at 11-13.

Before Appellant began addressing the speech board messages, he was granted a continuing hearsay objection (T. 112). After the prosecutor was allowed to admit the evidence over Appellant's objection, Appellant was entitled to examine witnesses concerning the evidence, and did not waive his objection in doing so. See e.g., State v. Guinn, 752 P.2d 632, 636 (Idaho App. 1988)(after motion to suppress is denied and evidence is admitted, defendant's introduction of testimony on that evidence does not waive objection to its admissibility).

Had Appellant been the party to introduce testimony concerning the speech board messages, Respondent's argument that Appellant's discussion of the speech board messages rendered the State's discussion of them harmless error would be appropriate. However, it was only after the court determined that the speech board messages were admissible and the prosecution introduced

testimony about them that Appellant had a need to address the messages. Appellant's attempts to defuse the impact of the speech board messages should not translate the admission of the evidence into harmless error - Appellant has a right to a fair trial and a right to an appeal, and should not be forced to choose between the two.

Appellant maintains that the speech board messages were inadmissible hearsay statements, which prejudiced Appellant's case. They improperly bolstered the testimony of Jessica Hadfield and were admitted solely to induce the jurors to convict Appellant because they sympathized with Jessica Hadfield's victimization.[11]

III.
THE COURT'S PERFORMANCE
DURING THE SENTENCING PHASE OF
APPELLANT'S TRIAL WAS ARBITRARY AND
CAPRICIOUS, AND DENIED APPELLANT DUE PROCESS.

Apparently because Appellant has not yet succeeded in supplementing the record in this case with the press coverage of the proceedings in the trial court,[12] to which press coverage

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11 Appellant encourages the members of this Court to view Exhibit 1 and to notice the torn and crumpled condition of some of the speech board messages, yet another overture to the jurors to sympathize with the pain felt by Jessica Hadfield.

12 On June 30, 1989, Appellant first moved in this Court to supplement the record in this case with all press coverage of this case. This motion was based on the grounds that the trial court indicated it had been exposed to the press coverage of the case. On July 26, 1989, this Court denied the motion, apparently because Appellant did not specify the news items to be added to the record.

On July 31, 1989, Appellant amended the motion to supplement the record with the specific items of news coverage of the case that the trial court admitted having watched and read.

Judge Wilkinson admitted his exposure, Respondent claims that there is no evidence that the trial court was influenced by the press in sentencing Appellant. Respondent's brief at 13-16.

While Appellant is hopeful that the record in this case will eventually contain the press coverage of this case that Judge Wilkinson admitted having read and watched, Appellant's claim that the trial court violated due process in conducting the sentencing phase of Appellant's trial stands, regardless of the supplementation of the record.

Appellate counsel concedes that the media coverage of this case other than that to which Judge Wilkinson admitted exposure is not relevant to this case and should not have been included in the appendix to Appellant's opening brief.[13] However, it is appropriate for this Court to read the Salt Lake Tribune article which Judge Wilkinson admitted having read[14] and for this Court to view the videotape of the KUTV news

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This Court denied that amended motion on August 3, 1989, apparently because the trial court had not been given the opportunity to rule on the motion.

Appellant then moved in the trial court to supplement the record with the specific items of news coverage to which the court had been exposed, as indicated on the record during the sentencing phase of this case. The trial court denied this motion August 30, 1989.

The trial court's denial of Appellant's motion to supplement the record is currently on appeal before this Court in case number 890532-CA, which appeal, by order of this Court dated September 14, 1989, will be briefed in ten page memoranda and consolidated with the instant appeal during oral arguments.

13 Appellate counsel, Elizabeth Holbrook, is responsible for and regrets appending the articles of April 15, 1988, November 20, 1988, and November 22, 1988.

14 Article of November 19, 1988.

broadcasts[15] which Judge Wilkinson admitted having watched during the sentencing phase of Appellant's trial (T.2 14, 30, 35). This fact is supported by reference to State v. Harvey, 491 P.2d 660 (Wash.App. 1971).

In Harvey, the defendant pled guilty to three counts of armed robbery. Id. at 661. On appeal, he challenged, inter alia, his ability to enter the guilty pleas. Id. In raising the issue of competency on appeal, the defendant appended an affidavit indicating that at the time the crimes were committed, and apparently at the time he entered the guilty pleas, he was under the custody of a mental hospital. Id. at 662. While the affidavit was not presented to the trial court, and therefore was not technically evidence in the record on appeal, the appellate court found that the fact that the substance of the affidavit was brought to the trial court's attention justified appellate consideration. The court stated:

> The affidavit cannot be considered as evidence in the case because it was not a part of the record on appeal. We can, however, consider the affidavit as a part of the defendant's brief where it raises a constitutional issue and is supported by the record.

Id. at 662 (citation omitted).

In this case, the record supports Appellant's assertion that Judge Wilkinson read the Tribune article and saw the KUTV news coverage of November 19, 1988 (T.2 14, 30, 35). Further, Appellant asked the court to insulate itself from the press by

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15 Broadcasts on November 19, 1988.

closing the sentencing proceedings to the press (T.2 13, 44) and warned the court that the inflammatory press coverage of the case was jeopardizing Appellant's right to a fair sentencing (T.2 13). The trial court refused to close the sentencing phase to the press (T.2 14, 44-45), admitted exposure to the inflammatory press coverage (T.2 14, 30, 35), and found that the court was not influenced by the exposure to the press (T.2 31).

Because the Tribune article and KUTV news coverage were evaluated by the court below, and because they support Appellant's claim that his constitutional rights were violated during the sentencing phase, this Court should view those articles, regardless of whether or not they are technically made part of the record. See Harvey at 662.

In the event that this Court declines to examine the press articles, Appellant notes that the transcripts of the sentencing phase provide "record" evidence that the court was influenced during the sentencing phase by either the press or by the actions of defense counsel. See Appellant's opening brief, pages 19-28. Respondent states that due process requires "that the trial court's sentence be based on factual information and defendant's background." Respondent's brief at 14, citing State v. Carson, 597 P.2d 862, 864-865 (Utah 1979). In basing Appellant's sentence on either the influence of the press or the court's anger at defense counsel, the court violated Appellant's right to due process during the sentencing phase of his trial. Id. See also Appellant's opening brief, pages 31-34.

CONCLUSION

Because of the errors committed during the voir dire of the jurors and in the admission of the hearsay speech board messages, Appellant is entitled to a new trial. At the very least, this Court should remand this case for sentencing that complies with standards of due process.

Respectfully submitted this 12 day of Sept, 1989.

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CERTIFICATE OF DELIVERY AND MAILING

I, Elizabeth Holbrook, hereby certify that 8 copies of the foregoing were delivered to the Utah Court of Appeals, and that four copies of the foregoing will mailed, postage prepaid, to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah, 84114, this 12 day of Sept, 1989.

ELIZABETH HOLBROOK

DELIVERED by _____ this _____ day of _____, 1989.

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